

**SOAH DOCKET NO. 582-13-4773**  
**TCEQ DOCKET NO. 2011-1907-MWD-E**

<b>EXECUTIVE DIRECTOR OF THE</b>	§	<b>BEFORE THE</b>
<b>TEXAS COMMISSION ON</b>	§	
<b>ENVIRONMENTAL QUALITY,</b>	§	
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	<b>STATE OFFICE OF</b>
	§	
<b>CITY OF BRIDGE CITY,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**THE EXECUTIVE DIRECTOR’S EXCEPTIONS TO THE  
PROPOSAL FOR DECISION AND PROPOSED ORDER**

TO THE COMMISSIONERS AND THE HONORABLE ADMINISTRATIVE LAW JUDGE  
KERRIE QUALTROUGH (ALJ):

The Executive Director (ED), after reviewing the Administrative Law Judge’s (ALJ’s) Proposal for Decision (PFD) and proposed order (Proposed Order), respectfully files these exceptions for the ALJ’s reconsideration and the the Commissioners’ consideration.

In this case, the ED alleges nine water quality violations against the City of Bridge City (Respondent or the City). The ALJ found that the ED did not prove two violations: failing to prevent a discharge from the Respondent’s dewatering box at the Facility (Dewatering Spill Violation), and failing to have a self-contained breathing apparatus (SCBA) onsite (SCBA Violation). The ALJ found that the ED’s recommended penalty is appropriate, less the penalty amounts recommended that are attributable to the Dewatering Spill Violation and the SCBA Violation.

The ED does not except to the ALJ’s determinations regarding the Dewatering Spill Violation or the timing of corrective actions in this case. However, the ED does respectfully except to the ALJ’s determination that the SCBA Violation was not proven and does except to a reduction in the penalty in the amount attributable in the SCBA Violation.

The parties stipulated to the SCBA Violation and consequently, there was not a full record regarding the SCBA violation. While there was some discussion about the status of the SCBA Violation stipulation, the parties agreed to the stipulation of the SCBA Violation as well as

seven of the other alleged violations in this case. The ED respectfully requests that the stipulation be applied; having an SCBA onsite is important for the safety of the people at the WWTP, and it is an important aspect of properly maintaining and operating a WWTP.

The ED respectfully requests that the ALJ recommend and that the Commission determine that eight violations occurred, which includes the SCBA Violation; an appropriate penalty is \$79,575<sup>1</sup>; and the appropriate corrective actions are as stated in the ALJ's Proposed Order.

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<sup>1</sup> This amount is equal to the amount the ED recommended at the evidentiary hearing of \$86,050 minus the amount attributable to the Dewatering Spill Violation which is \$6,475. ED 5 at 7.

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## I. Summary

The Respondent owns and operates a waste water treatment plant (WWTP). It is an old WWTP with copper bolts.<sup>2</sup> The City has a history of not effectively removing solids from the effluent in the plant dating back at least to 2002.<sup>3</sup> This has led to discharges of sludge in the receiving stream of the WWTP.<sup>4</sup> The City also has a history of operational and maintenance problems<sup>5</sup> and problems with corrosion<sup>6</sup>.

On May 25 and 26, 2011, TCEQ investigator Scott Griffith did an onsite investigation at the City's WWTP. He documented the nine violations alleged in the Executive Director's Preliminary Report and Petition (Petition) in this case.<sup>7</sup> The Respondent has stipulated to eight of the nine violations.<sup>8</sup>

At the evidentiary hearing in this case, the ED recommended a penalty of \$86,050. The Respondent has stipulated that the penalty recommended by the ED is calculated in accordance with the TCEQ penalty policy and the statutory factors in chapter 7 of the Texas Water Code. Yet, the Respondent asked that the penalty be reduced due to what the City has gone through during Hurricane Ike. Hurricane Ike did cause vast flooding in the City in September 2008. The ED has already given the City consideration for both Hurricane Ike and Hurricane Rita; for the two investigations prior to the 2011 investigation for this case, the ED declined to seek penalties and pursue an order in consideration of the City's circumstances. The ED does not agree that the City should be given additional consideration in this case for at least the following reasons:

- The City has a history of being unable to remove solids in its waste water treatment plant dating back to 2002 and pre-dating Hurricane Ike.
- The City has had discharges of sludge, which is untreated or partially treated domestic waste, into the plant's receiving stream pre-dating Hurricane Ike.

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<sup>2</sup> Test. of Mark Kelly and Jerry Jones.

<sup>3</sup> Test. of Scott Griffith; ED 1 and ED 14 through ED 18.

<sup>4</sup> Test. of Scott Griffith; ED 16 at 6 (2006 investigation); ED 1 at 17-18 (2011 investigation); and ED 18 at 11 (2012 investigation).

<sup>5</sup> Test. of Scott Griffith; ED 1 and ED 14 through ED 18; see, e. g. ED 1 at 7-8 (15 operational and maintenance violations noted at the 2011 investigation).

<sup>6</sup> See, e.g., ED 16 at 6 (a "significant amount of corrosion" is on all three clarifiers at the 2006 investigation, which is before Hurricane Ike).

<sup>7</sup> Test. of Scott Griffith; ED 1.

<sup>8</sup> ED 37.

- There is significant risk to human health and the environment from discharges of sludge into the receiving stream resulting in a need for the City to timely address the discharges and the plant's inability to effectively remove solids.
- Significant time has elapsed between 2002 and 2012, and the City has not addressed its plant's inability to remove solids from effluent and has not addressed the reoccurring sludge discharges.
- The recommended penalty of \$86,050 has already been reduced from the original \$145,370 penalty that was originally calculated by ED Staff and approved by management as appropriate for the violations in this case.
- Many of the violations could not possibly be related to Hurricane Ike.
- All parties agree that ED's recommended penalty is in accordance with the TCEQ Penalty Policy and the statutory factors in TEX. WATER CODE § 7.053.

In the PFD, the ALJ found that the ED had proven seven of the nine violations, and recommended a penalty of \$66,626, which is the ED's recommended penalty less the amounts the ED recommended for the two violations the ALJ determined were not proven. The ALJ determined that the ED had not proven the Dewatering Spill Violation or the SCBA Violation. While the ED does not necessarily agree with the ALJ's findings regarding the Dewatering Spill Violation, the ED does not except to them.

As to the SCBA Violation, the ED does except to the ALJ's determinations. The SCBA Violation is one of the violations the parties specifically stipulated to.<sup>9</sup> Because it was a stipulated violation, the ED did not provide a full record of evidence regarding this violation. Additionally, even with the record in this case, the ED did prove this violation. As such, the ED asks that there be a finding that this violation occurred and the penalty in this case include the recommended penalty for this violation.

## **II. The Commission should find that the SCBA Violation occurred because the parties stipulated to the violation and the ED proved the violation.<sup>10</sup>**

In the SCBA Violation, the ED alleges that the Respondent did not have a SCBA device at the Facility and was required to do so. The ED cited to 30 TEX. ADMIN. CODE § 305.125(5) which requires permittees to comply with all permit conditions. The permit condition the ED alleged

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<sup>9</sup> ED 37 at 1, para. 2.e.

<sup>10</sup> The ED's exhibits in this case will be referred to in this document as "ED" [exhibit no.] at [page] ([description if necessary]).

was not complied with is TPDES Permit No. WQ0010051001, Operational Requirements No. 1. Operational Requirements No. 1 states:

The permittee shall at all times ensure that the facility and all of its systems of collection, treatment, and disposal are properly operated and maintained. This includes the regular, periodic examination of wastewater solids within the treatment plant by the operator in order to maintain an appropriate quantity and quality of solids inventory as described in the various operator training manuals and according to accepted industry standards for process control such as the Commission's "Recommendations for Minimum Process Control Tests for Domestic Wastewater Treatment Facilities." Process control records shall be retained at the facility site and/or shall be readily available for review by a TNRCC representative for a period of three years.<sup>11</sup>

**A. The Respondent stipulated to the SCBA Violation so this violation is not in dispute.**

Before the evidentiary hearing in this case, the parties agreed to stipulations regarding eight of the nine alleged violations. During the hearing, the parties further agreed to stipulations regarding the penalty. The final version of the stipulations is found at Exhibit ED 37. As stated in the PFD, the Respondent and the ED both agreed to the stipulations in ED 37. The SCBA Violation is one of the violations stipulated to in ED 37.<sup>12</sup>

At the hearing, the parties offered Joint Exhibit 1 which contained stipulations, including a stipulation of the SCBA Violation. The third stipulation contained some handwritten language. During the hearing, the parties orally agreed and the judge approved that the third stipulation (regarding penalties) would extend to the statutory factors to be considered when assessing penalties in chapter 7 of the Texas Water Code. As discussed at the hearing, the ED offered ED 37<sup>13</sup> after the hearing, which contains all the stipulations in typed print (instead of part handwritten and part oral).

During the hearing, the Respondent offered evidence that the SCBA Violation was unintentional. The Respondent did not claim to dispute the violation. Culpability and the facts and circumstances of a violation are factors in considering the appropriate penalty for the violation. Due to the Respondent's evidence and after the parties finished presenting evidence in this case, the ALJ asked for clarification about the stipulation of the SCBA Violation. The Respondent does not dispute the existence of the SCBA Violation stipulation. In fact, in the Respondent's closing, the Respondent acknowledged the only violation it is contesting is the

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<sup>11</sup> ED 2 at 11 (TPDES Permit at 9).

<sup>12</sup> ED 37 at 1, para. 2.e.

<sup>13</sup> As discussed in the PFD, the ED originally offered ED 34 as the typed stipulations, but that document contained an error so the ED withdrew ED 34 and offered the corrected stipulations in ED 37.

Dewatering Spill Violation. The second sentence of the Respondent's closing argument filed in this case states:

Specifically, the city does not deny and has in fact stipulated to all the issues save and except the failing to prevent the unauthorized discharge of waste water or other waste outside the container area of the sludge dewatering box.

The Respondent's agreement was confirmed when it agreed to the amended stipulations in ED 37.

Because the parties stipulated to the SCBA Violations, the occurrence of this violation is not in dispute. Thus, the ED is not required to prove the violation through traditional evidence. One of the purposes of stipulations is to narrow the issues to streamline the case by allowing the parties to present evidence only on issues in dispute. Because the SCBA Violation was not in dispute and there is a stipulation on record for this violation, the ED asks that the Commission find this violation occurred.

**B. The ED did establish the SCBA Violation.**

In the PFD, the ALJ finds that the City did not have a SCBA onsite at the Facility. The ALJ determined that having a SCBA onsite is not an operating and maintenance requirement, as the ED alleged. The ED disagrees.

Failing to maintain a SCBA onsite is a maintenance and operating requirement. The ED alleges the Respondent violated TPDES Permit No. WQ0010051001, Operational Requirements No. 1 (Operational Requirements No. 1). Operational Requirements No. 1 which requires the permittee "at all times ensure that the facility and all of its systems of collection, treatment, and disposal are properly operated and maintained."<sup>14</sup>

The ALJ states that because a SCBA is a design criteria, it cannot be an operational and maintenance requirement. The ED disagrees. As the ALJ acknowledges, the TCEQ's current<sup>15</sup> and previous<sup>16</sup> rules require such equipment as part of the minimum design criteria for domestic wastewater systems. If a WWTP is not maintained and operated consistent with minimum design criteria, then the WWTP is not being properly operated and maintained. Also, failure to have a SCBA onsite can prevent the ability to promptly address the most dangerous leaks. Failing to operate in a manner that allows for prompt addressing of dangerous leaks is an operational issue. The language in Operational Requirements No. 1 is broad and covers the entire Facility. Finding that it applies to some Facility components and not others could lead to

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<sup>14</sup> ED 2 at 11 (TPDES Permit at 9).

<sup>15</sup> 30 TEX. ADMIN. CODE §§ 217.278(d)(2) and 217.324(a) and (c) (effective August 28, 2008).

<sup>16</sup> 30 TEX. ADMIN. CODE §§ 317.6(b)(1)(D) (repealed when 30 TEX. ADMIN. CODE ch. 217 became effective).

inconsistent application of this permit provisions and a construction of this provision that is too narrow to cover all operational and maintenance concerns.

The ED would like to note that he did not cite to 30 TEX. ADMIN. CODE ch 217 because that chapter applies to a “person who proposes to construct, renovate, or re-rate a . . . . commission permitted wastewater treatment facility . . . .”<sup>17</sup> Ch. 217 was not effective until August 28, 2008 so arguably would not apply to the City’s WWTP.<sup>1</sup> The prior rules regarding minimum design criteria were in 30 TEX. ADMIN. CODE ch. 317, which have been repealed. Consequently, the ED cited Operational Requirements No. 1 which does currently apply to the Respondent.

Additionally, Operational Requirements No. 1 requires the Respondent to operate and maintain the WWTP consistent with industry standards. The fact that current and prior TCEQ rules regarding *minimum* design criteria require a SCBA supports that maintaining one onsite is an operating standard. Additionally, the Texas A&M Engineering Extension Service (TEEX), which is a leading workforce training provider for wastewater operations, also acknowledges the importance of such equipment and that the TCEQ requires it. The TEEX “Basic Wastewater Operations” manual states: “TCEQ requires a self-contained breathing apparatus on site”.<sup>18</sup> The Manual of Wastewater Treatment by the Texas Water Utilities Association also discusses the importance of breathing apparatuses for chemical safety.<sup>19</sup>

Because the Respondent was not operating and maintaining the WWTP in accordance with industry standards, the Respondent was in violation.

**C. \$79,575 is the appropriate penalty for the eight violations (which would include the SCBA Violation).**

Lanae Foard testified that the penalty was calculated in accordance with the TCEQ Penalty Policy and in consideration of the statutory factors in Tex. Water Code § 7.053. The Respondent stipulated both that penalty was calculated in accordance with the TCEQ Penalty Policy and in consideration of the statutory factors in Tex. Water Code § 7.053.<sup>20</sup> The ALJ also agreed that the ED’s recommended penalty is appropriate for the violations the ALJ found the ED had proven.

At the evidentiary hearing, the ED recommended a penalty of \$86,050. The ALJ reduced the ED’s recommended penalty by the amounts associated with the two violations the ALJ has found that the ED did not prove: the Dewatering Spill Violation and the SCBA

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<sup>17</sup> 30 TEX. ADMIN. CODE § 217.1(a) (emphasis added).

<sup>18</sup> ED 35 at 3 and 6.

<sup>19</sup> ED 36 at 3.

<sup>20</sup> ED 34 (attached) and Joint Exhibit 1 (earlier version of stipulations).



Violation. Because the ED does not except to the ALJ's determination regarding the Dewatering Spill Violation, the ED agrees that a reduction of the ED's recommended penalty of \$6,475 is appropriate.<sup>21</sup> The ED does not agree with the ALJ's additional reduction of \$12,949, which is the amount attributable to the SCBA Violation.<sup>22</sup> Thus the ED recommends a penalty of \$86,050 minus \$6,475, for a total of \$79,575.

### **III. The ED's exceptions to specific provisions in the ALJ's Proposed Order.**

The ED submits the following exceptions to the language in the Proposed Order.

#### **A. FINDING OF FACT NO. 23.**

The ED asks that the name "Jennifer Cooke" in this Finding of Fact be changed to "Jennifer Cook" (no "e" on the end of the last name) to provide a spelling correction.

#### **B. CONCLUSIONS OF LAW NO. 9.**

The ED respectfully recommends that Conclusion of Law No. 9 be removed and that the remaining Conclusions of Law be renumbered accordingly.

#### **C. CONCLUSION OF LAW NO. 11.**

The ED respectfully recommends that the current Conclusion of Law No. 11 be revised to change the penalty amount from "\$66,626" to "79,575".

#### **D. ORDERING PROVISION NO. 1.**

The ED respectfully recommends that ordering provision no. 1 be revised to change the penalty amount from "\$66,626" to "79,575".

### **IV. CONCLUSION**

For these reasons, the ED respectfully requests the ALJ recommend and the Commission adopt the ED's exceptions.

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<sup>21</sup> ED 5 at 7.

<sup>22</sup> ED 5 at 13.

Respectfully submitted,

Texas Commission on Environmental Quality

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### CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2014<sup>23</sup>, the foregoing original document and seven (7) copies were filed with the Chief Clerk, additionally the document was electronically filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day the foregoing document was served as indicated:

The Honorable Administrative Law Judge Kerrie Qualtrough  
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Jennifer Cook

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<sup>23</sup> The ED files this document on January 29, 2014 instead of January 28, 2014, because both TCEQ offices and SOAH's offices were closed due to inclement weather on January 28, 2014.